

**DECISION**

THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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**FILE:** B-213682**DATE:** April 2, 1984**MATTER OF:** Information Consultants, Inc.**DIGEST:**

A protest of the proposed award of a subcontract is dismissed because the protest does not meet any of the circumstances under which GAO considers protests of subcontract awards.

Information Consultants, Inc. (ICI) protests a solicitation and proposed subcontract award by an Environmental Protection Agency (EPA) prime contractor, Fein-Marquart Associates, Inc. (FMA), to obtain teleprocessing services for the Chemical Information System (CIS)\* maintained by EPA in conjunction with the National Institutes of Health. ICI maintains that the evaluation provisions of the solicitation are defective, that there are provisions in the solicitation that are ambiguous, overly restrictive and in excess of the government's minimum needs, and that the solicitation permits FMA to resell computer resources paid for by the government. We dismiss the protest because it does not meet any of the limited circumstances under which we will review subcontractor protests.

EPA awarded a cost-reimbursement, fixed-fee contract to FMA in September 1982, under which FMA was to collect data and develop software in the CIS format. The contract also called for FMA to provide teleprocessing services until April 1, 1983, at which time the government would supply its own services. The contract required EPA approval of any subcontract and gave approval to a subcontract with ICI from October 1, 1982 through March 30, 1983.

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\*The CIS is a data retrieval system available to subscribing users that offers information about the effects of chemical substances and mixtures on health and the environment.

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On April 1, however, the government was not able to supply its own teleprocessing services and, as a result, FMA continued to provide them through ICI. EPA thereafter extended FMA's contract through September 30, 1984. On September 30, 1983, EPA modified the contract to state that FMA would supply teleprocessing services throughout the remainder of the firm's contract.

Since ICI's contract with FMA is due to expire on April 30, 1984, FMA in November 1983 sent out a solicitation to interested companies for a teleprocessing services subcontract to begin in May 1984. On November 9, ICI filed a protest with this Office. Shortly thereafter, FMA proposed to award a subcontract to American Management Systems (AMS) and submitted the subcontract to EPA for its approval. EPA's decision on the subcontract is pending.

Our Office will consider subcontractor protests only in the limited circumstances set forth in our decision Optimum Systems, Incorporated - Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. ICI contends that three of those circumstances are applicable here, that is:

1. The government directly or actively participated in the selection of the subcontractor so that the net effect was to cause or control the rejection or selection of a potential subcontractor.
2. The prime contractor is acting as a purchasing agent of the government so that the procurement is in reality "for" the government.
3. There is a showing of fraud or bad faith on the part of government officials approving a subcontract award.

#### 1. Government's Participation in the Subcontractor Selection

ICI first asserts that EPA's active or direct participation in the selection of the subcontractor had the net effect of significantly limiting subcontract sources. In this regard, the firm argues that EPA: (1) directed FMA to conduct the reprocurement; and (2) assisted in drafting the solicitation, and approved the document. Since the computer capacity specified in FMA's solicitation had the effect of eliminating vendors that did not have substantial amounts of idle computer time, ICI continues, our review of the subcontract award is appropriate.

We do not believe that the record supports ICI's assertion of active EPA participation. On the question of whether EPA directed the reprocurement, for instance, the only pertinent evidence is the September 1983 modification of FMA's contract with EPA. In our view, the modification merely required the firm to continue supplying teleprocessing services through the end of the contract. It clearly left the manner in which FMA obtained those services within the firm's discretion. Thus, there is no evidence that EPA directed the reprocurement.

Nor do we believe that the record demonstrates that EPA drafted or approved the specifications. In support of its position, ICI relies on the fact that the contracting officer reviewed and commented upon the solicitation. EPA counters that the contracting officer, upon receiving a copy of the solicitation from FMA, merely suggested editorial changes and purposely avoided making any comments on the substance of the document. EPA submitted a copy of the solicitation showing the contracting officer's notes.

We have examined those notes and find them to be editorial in nature. Thus, there is no evidence here of EPA participation in the drafting of the substantive portions of the solicitation. In addition, we do not believe that the contracting officer's review and editing of the solicitation at FMA's invitation was tantamount to EPA's approving the document. While ICI suggests that EPA's contractual right to approve the subcontract amounts to active participation, our decision in Optimum Systems, supra, makes it clear that the agency's reservation of that right to review and approve a subcontract award does not alone compel our review. We conclude therefore that ICI's allegation of EPA participation is without merit.

## 2. The Procurement is "For" the Government

ICI also contends that we should review this subcontract award because the subcontract was "for" EPA. ICI asserts that FMA is primarily a program manager that is subcontracting for the development and implementation of a government project. We disagree.

We traditionally have considered subcontracts "for" the government to include only: (1) those awarded by prime contractors operating and managing Department of Energy facilities; (2) purchases of equipment for government-owned, contractor-operated plants; and (3) procurements by

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construction management prime contractors under cost-type contracts. Worldwide Direct Marketing; Market Compilation and Research Bureau, Inc., B-210726, B-210726.2, May 19, 1983, 83-1 CPD 533. Under these types of contracts, the prime contractor primarily provides large-scale management services to the government, and, as a result, generally has an on-going purchasing responsibility. In essence, the prime contractor is only a "middleman" between the government and the subcontractor.

Here, while FMA has some management responsibilities under its contract with EPA, its contract is not one primarily for furnishing management services. Rather, FMA's main responsibility is to develop CIS software. Since that function does not consist of operating as a "middleman" between the government and the teleprocessing services subcontractor, we do not believe the subcontract qualifies as one "for" the government according to the standard set forth in our prior cases.

### 3. Fraud or Bad Faith

Finally, ICI argues that EPA's approval of the subcontract in this instance would amount to fraud or bad faith. Specifically, ICI asserts that AMS' subcontract illegally proposes a cost-plus-a-percentage-of-cost reimbursement arrangement and permits FMA to resell at its price to customers of its choice unused teleprocessing services paid for by EPA.

EPA's decision on AMS' subcontract is still pending and thus we believe that the argument concerning fraud or bad faith on the part of the contracting officer in approving the proposed award is premature. In this regard, we note that EPA has expressed strong reservations concerning certain provisions of the subcontract, particularly that provision relating to the resale of computer time. We therefore will not consider this issue.

The protest is dismissed.

*Harry R. Van Cleve*  
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Acting General Counsel